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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

PLEASANT VIEW ELEMENTARY SCHOOL PTA, AND MYRA FREER AND WILBUR H. FRIEDMAN, JR.,
*Petitioners,*

v.

GROUP I DEFENDANTS, ET AL.,
*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STEPHEN H. SACHS,
Attorney General of Maryland,
ELLEN M. HELLER,
Assistant Attorney General,
*Counsel of Record,*
The Munsey Building,
Seven North Calvert Street,
Baltimore, Maryland 21202,
(301) 576-6450,
Attorneys for Respondent,
Maryland State Board of Education.

CHARLES A. REESE,
JUDITH S. BRESLER,
REESE & CARNEY,
255 N. Washington Street,
Rockville, Maryland 20850,
(301) 762-6210,
Attorneys for Respondent,
Board of Education of
Montgomery County.

The Daily Record Co., Baltimore, MD 21202

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In The
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October Term, 1985

PLEASANT VIEW ELEMENTARY SCHOOL PTA,
and
MYRA FREER and WILBUR H. FRIEDMAN, JR.
Petitioners

v.

GROUP I DEFENDANTS, ET AL.
Respondents

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

## QUESTIONS PRESENTED

1. Does the closing of Pleasant View Elementary School violate the procedural

due process and equal protection requirements of the Fourteenth Amendment and 42 U.S.C. §1983?

2. After finding Petitioners' constitutional claims meritless, did the district court have the discretion not to exercise jurisdiction over the pendent State claims?

3. Was certification of the State law claims to the Court of Appeals of Maryland necessary in light of the fact that in Maryland courts have determined that school closing decisions are not justiciable?

## STATEMENT OF THE CASE

### Introduction

This case arose from the decision of the Board of Education of Montgomery County ("County Board") on December 18, 1981 to close the Pleasant View Elementary School. Thereafter, Petitioners ("PTA") and Wilbur Friedman[1/] embarked on a multi-

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[1/]Although Petitioner characterizes itself as (cont'd)

faceted administrative and judicial attack to overturn the school closing. The school was closed on June 30, 1982. App. A at 38.[2/] It has remained vacant and is becoming useless through vandalism and decay. App. F at 45a.

Because of declining enrollment and underutilization of school facilities, in March, 1981 the County Board adopted a long-range policy to govern school closings. App. A at 2a-3a. Those policies instructed the County Superintendent to gather data and publish preliminary recommendations for boundary modifications for school consolidations and closures. These preliminary recommendations were distributed for comment to various individuals and groups within the community. Complaint at p. 9. The County Superintendent then presented his final

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the Pleasant View Elementary School PTA, that entity has long since dissolved and there is no indication that the community or the PTA is aware of or has lent its support to this court action.

[2/]All references to Appendices are to those of the Petition for Writ of Certiorari unless otherwise stated.

recommendations to the County Board. Id. The Superintendent, in both his preliminary and final recommendations, proposed the retention of the Pleasant View Elementary School and the closure of other elementary schools in nearby neighborhoods. App. B at 12a. However, by a majority vote in each case, the County Board proposed the closure of Pleasant View Elementary School as an alternative to closing another elementary school in the area. The County Board held hearings with respect to each of these schools. App. B at 12a-13a. Representatives of Pleasant View Elementary School appeared at a public hearing before the County Board. App. A at 3a. On November 18, 1981, after the community had been given an opportunity to participate in a public hearing, the County Board voted to close Pleasant View Elementary School. Id.

## Administrative Proceedings

PTA then filed a timely appeal to the Maryland State Board of Education ("State Board"). App. A at 3a. PTA participated in a two-day full evidentiary hearing be-

fore the State Board Hearing Examiner. Id. After the hearing, the Hearing Examiner, in a detailed opinion stating findings of fact and conclusions of law, recommended that the State Board affirm the decision of the County Board. Id. The State Board upheld its Hearing Examiner's recommendations in a written opinion issued on June 30, 1982. Id.

State Judicial Proceedings

On July 6, 1982 PTA filed an Order of Appeal in the Circuit Court for Montgomery County, Maryland, pursuant to the State Administrative Procedure Act, MD. ANN. CODE, Md. State Gov't. Code Ann. §§10-101--10-405 (1984). The circuit court issued an Opinion and Order on November 3, 1982, finding no constitutional or statutory basis for the appeal. The County Board's demurrer was sustained without leave to amend. App. C at 26(a)-37(a). In an unreported opinion, the Court of Special Appeals of Maryland affirmed the Circuit Court's decision. App. D at 38(a)-42(a). The Maryland Court of Appeals denied PTA's request for a writ of certiorari on September 29, 1983. App.

E at 43(a). On March 10, 1984, PTA filed a Motion for Reconsideration in the Maryland Court of Appeals requesting that court to vacate its 1983 denial of the petition for certiorari. That motion, which was denied, once more urged review of the State Board's decision under the State Administrative Procedure Act.[3/]

Proceedings in the District Court

This case was filed in the United States District Court for the District of Maryland on December 12, 1983 and assigned to a Magistrate for final disposition pur-

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[3/] On Oct. 31, 1985 PTA filed an action in State court against the Hon. Judge Philip M. Fairbanks and the Hon. Judge David L. Cahoon of the Circuit Court of Montgomery County. Pleasant View Elementary School PTA v. Fairbanks, et al., Civil Action No. 10544. The case, a civil rights action, alleges that Judge Fairbanks, by denying Plaintiffs' leave to amend their original complaint, denied them the right to access to the State courts, to due process, and to equal protection. The complaint requests Judge Cahoon, the administrative judge, to reassign the case to Judge Fairbanks who is now retired. PTA has requested the Maryland courts to stay this new State court proceeding pending disposition of the Supreme Court's consideration of the petition for certiorari.

suant to 28 U.S.C. §636(c). In an Opinion dated October 10, 1984, Magistrate Frederic N. Smalkin granted the Respondent's Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). App. F at 44(a)-58(a); App. G at 59(a)-62(a).

The essence of PTA's complaint before the district court was that the State and County Boards of Education had ignored certain provisions of Maryland law, including the Maryland Declaration of Rights, Maryland statutory law pertaining to educational matters, the regulations of the State and County Boards of Education, and the "common law governing the conduct of administrative agencies." App. F at 47(6). As to these State claims, the district court found that the Eleventh Amendment as interpreted by this Court in Pennhurst State School & Hosp. v. Halderman, ___ U.S. ___, 104 S.Ct. 900 (1984), barred the exercise of federal pendent jurisdiction. App. F at 46(a)-49(a). Further, in a supplemental Memorandum and Order, the district court

concluded that even if Pennhurst did not apply, it would still not exercise pendent jurisdiction over the State law claims as it had determined the federal claims did not have merit. United Mine Workers v. Gibbs, 383 U.S. 715 (1966). App. G at 61(a). In response to PTA's argument that the State law claims should be certified to the Court of Appeals of Maryland, the district court found it would be "pointless" to certify these issues as the Maryland appellate courts have established "a firm rule that school closing decisions are simply not justiciable." App. F at 50(a).

The district court also found there was no merit to PTA's federal constitutional claims. It held that the allegations that State or local officials failed to follow their own regulations in the conduct of administrative proceedings did not itself violate the federal constitution. In addition, it found that even if PTA had a protected liberty or property interest under Maryland law in having the Pleasant View Elementary School remain

open, it was clear that notice was given and hearings provided "all along the line of administrative proceedings." App. G at 52(a)-53(a). In regard to the equal protection claim, the court found that PTA's complaint specifically disavowed the existence of any racial implications and showed that the State and county officials had considered relevant factors, and therefore their decision had a rational basis. Having failed to state any cognizable claim of violation of the federal constitution, the court found it lacked jurisdiction under 42 U.S.C. §1983. The court concluded that "Plaintiffs, having lost their case in the administrative forum provided by the State, and also having realized that, under State law, that loss was final, have sought the intervention and interposition of this Court in a matter of entirely local concern." App. G at 56(a).

Proceedings in the Court of Appeals

After a final appeal was considered on full briefs and argument, the Court of Appeals for the Fourth Circuit affirmed

the dismissal on June 6, 1985, and a Petition for Rehearing was denied on July 22, 1985. The Court of Appeals affirmed the district court opinion. However, it did not rule on the dismissal of the pendent State claims under the Eleventh Amendment. Rather, it upheld the district court's discretionary decision to dismiss the pendent State claims under United Mine Workers of America v. Gibbs, 383 U.S. at 726. App. A at 7(a).

## REASONS FOR DENYING CERTIORARI

### I.

### The Lower Courts Correctly Held That The State And Local Boards Did Not Violate The Equal Protection And Procedural Due Process Requirements Of The Fourteenth Amendment In The Closing Of Pleasant View Elementary School.

A. There was no violation of the procedural due process requirements of the Fourteenth Amendment in the closing of Pleasant View Elementary School.

The entire basis of PTA's argument is that the State and County Boards breached their constitutional duty to follow their

own rules, state reasons, and act consistently in the closing of Pleasant View Elementary School.[4/] Brief at pp. 24-25. The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. Board of Regents v. Roth, 408 U.S. 564, 569 (1972). Property interests are not created by the Constitution; rather they are created by State law. Board of Regents v. Roth, 408 U.S. at 577. The district court was correct that "[i]t is highly doubtful" that PTA "had a protected liberty or property interest

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[4/] PTA admitted before the lower court that the County Board's long-range policy did not have the effect of law and conceded, "We not pause to consider the interesting issue of whether the local board regulations, on a sub-delegation theory, also have the force of law." Plaintiffs' Opposition to Defendants' Motion to Dismiss, Docket No. 13, at p. 3. Further, although it is true that the State Board has the authority to adopt bylaws, rules and regulations having the force and effect of law (Section 2-205(c) of the Education Article of the Maryland Annotated Code), in this instance the resolutions in question have never been published and adopted as bylaws.

under Maryland law in having Pleasant View Elementary School remain open,...." App. F. at 52(a). See also, Cleveland Bd. of Educ. v. Loudermill, __ U.S. ___, ___, 105 S.Ct. 1487, 1491 (1985); Paul v. Davis, 424 U.S. 693, 709 (1976).

In Maryland, a county board of education has the statutory discretion to "establish a public school if, in its judgment, it is advisable" and the statutory responsibility to consolidate schools, if it considers such consolidation practicable. MD. EDUC. CODE ANN. §§4-108 and 4-119 (1985). Based on these provisions of State law, the Maryland Court of Appeals has held "[a]bsent a claim of deprivation of equal educational opportunity or unconstitutional discrimination because of race or religion, there is no right or privilege to attend a particular school." Bernstein v. Bd. of Educ. of Prince George's Co., 245 Md. 464, 472, 226 A.2d 243, 248 (1967); see also, Elprin v. Howard Co. Bd. of Educ., 57 Md. App. 458, 464, 470 A.2d 833, 836 (1984). Further, United States District Court

decisions for the district of Maryland that have considered school closings have unanimously held that no property interest exists. Tsay, et al. v. Montgomery County Board of Education, et al., No. HM-83-1852 (D.Md. July 13, 1983); Welch v. Board of Education of Baltimore County, 477 F. Supp. 959 (D.Md. 1979).

Nor has a liberty interest been implicated by the closing of the Pleasant View Elementary School. By closing the school, Petitioners have alleged no imposition of physical restraint, cause or damage to personal reputation or good name, or interference with the ability of any individual to pursue any of the fundamental human endeavors that might be encompassed within the meaning of the term "liberty." Board of Regents v. Roth, 408 U.S. at 572-574.

In any event, both the Court of Appeals and the district court found that PTA was given the minimal elements of due process and that notice and hearings were provided throughout the administrative proceedings. Before the County Board's

decision to close Pleasant View Elementary School, Appellants were given a hearing. Additionally, they were given the right to appeal the County Board's decision to the State Board, and there were given a full evidentiary hearing before a State Hearing Examiner. Further, they had an opportunity for oral argument before the State Board. App. A. at 5(a); App. F at 52(a)-53(a).

"When the minimal due process requirements of notice and hearing have been met, a claim that an agency's policies or regulations have not been adhered to does not sustain an action for redress of procedural due process violations." Goodrich v. Newport News School Board, 743 F.2d 225, 227 (4th Cir. 1984). See also Atencio v. the Board of Education of Penasco Independent School District, 658 F.2d 774 (10th Cir. 1981); Bates v. Sponberg, 547 F.2d 325 (6th Cir. 1976). As this Court has held:

> §1983 does not extend the right to relitigate in federal court... the proper construction of school regulations. The system of public education that has evolved in this Nation relies

> necessarily upon the discretion and judgment of school administrators and school board members and §1983 was not intended to be a vehicle for federal court correction of errors in the exercise of that discretion which do not rise to the level of violations of specific constitutional guarantees. Wood v. Strickland, 420 U.S. 308, 326 (1975). See also Board of Educ. of Rogers, Arkansas v. McCluskey, 458 U.S. 966, (1982).

Thus, assuming arguendo that PTA had some constitutionally protected liberty or property interest, it is clear from the record that they were given the minimum elements of due process, and their claims that the agencies did not follow their own rules and regulations do not rise to the level of constitutional deprivation.

B. There was no violation of the Equal Protection Clause of the Fourteenth Amendment in the closing of Pleasant View Elementary School.

PTA has never clearly explained its equal protection claim. However, it has specifically disavowed the existence of any racial implications in the administrative decision under challenge or any other suspect classification or fundamental right. Complaint at ¶9.42. App. F at 53(a). Both lower courts found that as

PTA's complaint did not implicate a suspect class or fundamental right or allege the denial of an education to any child or the deprivation or impingement of the sensitive classes -- gender, alienage, or illegitimacy -- the rational basis test was applicable. Under this test, both courts found that the State and County Boards had considered the relevant factors involved in the school closing, i.e., special programs, lack of barriers, and busing, and that there was a rational basis for their decision to close Pleasant View. App. A at 5(a)-6(a); App. F at 53(a)-55(a). PTA failed its burden under the rational basis test to convince the courts that the "facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decision maker." Vance v. Bradley, 440 U.S. 93, 111 (1979); see, Minnesota v. Cloverleaf Creamery, 449 U.S. 456, 464 (1981).

C. PTA failed to state a claim under 42 U.S.C. §1983.

PTA asserted jurisdiction for its

alleged constitutional claims under the Civil Rights Act of 1871, 42 U.S.C. §1983. However, as both lower courts found, §1983 is remedial in nature and provides no substantive rights in itself. Rather, it merely provides a jurisdictional remedy for the deprivation of constitutional and federal rights. Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 616-618 (1979). PTA has not asserted that the closing of Pleasant View Elementary School violated any federal statutory rights. Therefore, to the extent it invokes §1983 for jurisdictional purposes to vindicate what it asserts are claims created by the U.S. Constitution, those claims must fail.

## II.

### The Lower Courts Were Correct To Dismiss The Pendent State Claims.

The district court dismissed PTA's pendent State claims because of the Eleventh Amendment as interpreted under this Court's decision in Pennhurst State School & Hosp. v. Halderman, ___ U.S. ___,

104 S.Ct. 900 (1984). Further, it found that even if Pennhurst did not apply, it would not exercise pendent jurisdiction over the State law claims because it had determined the federal claims did not have merit. United Mine Workers v. Gibbs, 383 U.S. 715 (1966). The Court of Appeals affirmed the dismissal of the State law claims for this reason, finding that having dismissed the federal claims, the district court had the discretion to dismiss the pendent claims. App. A at 7(a); App. G at 61(a). As this Court held in United Mine Workers v. Gibbs, "pendent jurisdiction is a doctrine of discretion, not of plaintiff's right." 383 U.S. at 726. "Its justification lies in consideration of judicial economy, convenience and fairness to litigants." Id. Decisions of State law should be avoided as a matter of comity, and "if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the State claims should be dismissed as well." Id. As the Court of Appeals held, "[h]aving dismissed the federal claims, the district court had the discretion to

dismiss the pendent State claims." App. A at 7(a).

PTA cites numerous cases which it claims stand for the proposition that if a State claim would be time-barred in State court, "the federal district court must, or should, exercise pendent jurisdiction over the State claims." Brief at pp. 34-35. These cases are clearly irrelevant as PTA's claims were not time-barred and have already been brought to the attention of Maryland's Court of Appeals. As PTA states, "[t]he State courts refuse to consider PTA's State claims on their merits." Brief at p. 36. What PTA desires is a federal court order that Maryland's courts reconsider PTA's claims. PTA also argues that it "is meaningless and misleading to say, as the lower courts did, that this action was dismissed before trial, because trial occurred before the State Board of Education and there will be no trial in the district court." Brief at pp. 33-34. PTA apparently is seeking to have the evidentiary hearing before the State Hearing

Examiner characterized as a trial before district court. This is a frivolous argument.

## III.

**Certification Of The State Law Claims To The Court of Appeals Of Maryland Is Unnecessary Since As Maryland Appellate Courts Have Established School Closing Decisions Are Nonjusticiable.**

The primary relief PTA seeks is to have all disputed questions of law submitted to the Maryland Court of Appeals. Brief at pp. 45-46. However, PTA has already lost its case in both the administrative and judicial forums provided by Maryland. In addition, as Magistrate Smalkin found, certification is "pointless" because Maryland courts have ruled that school closing decisions are nonjusticiable. Board of County School Commissioners of Caroline County v. Morris, 123 Md. 398, 91 A.718 (1914). See also Bernstein v. Bd. of Educ., 245 Md. at 472, 226 A.2d at 248; Elprin v. Howard Co. Bd. of Educ., 57 Md. App. at 466-467, 470 A.2d at 836-837.

Morris involved a challenge to a county board's decision to consolidate and close schools. In discussing the State Board's visitatorial and exclusive powers to resolve disputes of this nature with finality, the court held that:

> [W]hen the controversy or dispute is one involving the proper administration of the public school system of the State, the Court has no power to interfere, and that all such questions must be referred to and finally settled by the Board of Education.

Morris, 123 Md. at 403.

The Morris decision found that the "State Board which is charged with the duty of explaining the 'true intent and meaning of the law' has the full power to advise the School Board with respect to the proposed consolidation and to correct any erroneous action it may take." Morris, 123 Md. at 404. It observed that the statutes under which the State school system is organized "have provided the mode and agency for settling all such questions as this without resort to the court." Id.

## CONCLUSION

For three and a half years, the facility that once housed the Pleasant View Elementary School has remained vacant while Petitioner Wilbur Friedman has carried on a one-man battle to reopen the school. Under the most liberal interpretation, PTA's action is devoid of any meritorious constitutional claims. It was given notice and hearings before the County Board prior to the decision to close the school. A two-day evidentiary hearing was held before the State Hearing Examiner, and oral argument before the State Board itself. Clearly, PTA was afforded the required elements of notice and hearing under the Due Process Clause. In addition, in its own complaint, it has acknowledged reasons that would support a rational basis for the County Board's decision to close the Pleasant View Elementary School. Its entire claim is that the State and County Boards did not follow their own rules and regulations in the closing of the school. However, these assertions are

ones of State law. Even if the federal court had constitutional power under the Eleventh Amendment to consider these pendent State claims, it also had the discretion to dismiss those claims having found there was no merit to PTA's federal constitutional claims.

It is time for this lengthy and costly judicial journey to end. Respondents respectfully request this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

STEPHEN H. SACHS
Attorney General of Maryland

ELLEN M. HELLER
Assistant Attorney General

CHARLES A. REESE, Esquire

JUDITH S. BRESLER, Esquire